SHING HUP HIN CONSTRUCTION SDN BHD *a*

v.

GENERAL SOIL ENGINEERING SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL AZIZ MOHAMAD J
[COMPANIES WINDING-UP NO: D2-28-345-1998]
23 NOVEMBER 1998

COMPANY LAW: *Winding-up - Stay of proceedings - Whether s. 222 of the Companies Act 1965 empowers court to order stay of present winding-up petition or other pending proceeding* *c*

The respondent company, against whom a winding-up petition was brought, sought a stay of the hearing of the petition pursuant to s. 222 of the Companies Act 1965 ('the Act') until the conclusion of a civil suit brought by the respondent company against the petitioner company. *d*

Counsel for the petitioner company raised a preliminary question on whether s. 222 of the Act empowered the court to order a stay of the present winding-up petition.

e

Held:

[1] An application under s. 222 of the Act is to be done "At any time after the presentation of a winding-up petition and before a winding up order has been made, …" ie, during the pendency of a winding-up petition. The event that gives rise to the need to apply is "where any action or proceeding against the company is pending", the "company" here being the company that is sought to be wound up. This event must also be existing during the pendency of a winding-up petition. Coupling the time factor with the event, a situation arises where, during the pendency of the winding-up petition, there is **also** a pending action or proceeding against the company that is sought to be wound up. This action or proceeding must be other than the winding-up petition in question, although it may be some other winding-up petition. *f* *g*

[2] What may be applied for and ordered under s. 222 of the Act is a stay of further proceedings in the action or proceeding that is also pending. Section 222 of the Act does not empower the court to stay the present winding-up petition. *h*

[Respondent's application dismissed with costs.]

i

Cases referred to:
Bryanston Finance Ltd v. De Vries (No 2) [1976] 1 Ch 63 ***(dist)***
Foursea Construction (M) Sdn Bhd [1998] 3 CLJ 135 ***(not foll)***
Solid Kitchen Sdn Bhd v. Regal Development Sdn Bhd [1998] 3 CLJ Supp 409 ***(not foll)***

Legislation referred to:
Companies Act 1965, ss. 222, 176(1), (10)

Other source referred to:
Companies, Law and Practice, Magnus & Estrin, 5th edn, p 250

Reported by Cindy Chan

JUDGMENT

Abdul Aziz Mohamad J:

The respondent company against whom the present winding-up petition is brought is seeking a stay of the hearing of the petition until the trial of a civil suit brought by the respondent company against the petitioner company. The respondent company relies on s. 222 of the Companies Act 1965. Learned counsel for the petitioner company has raised a preliminary question to be answered, namely, whether s. 222 empowers the court to order a stay of the present winding-up petition. Authorities have been cited on both sides, but I think the question can be answered simply on a proper analysis of the manner in which s. 222 is constructed. It says as follows:

> At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the court to stay or restrain further proceedings in the action or proceeding, and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

The making of an application under s. 222, as represented by the words "may ... apply", is to be done "At any time after the presentation of a winding up petition and before a winding up order has been made", that is to say, during the pendency of the winding-up petition in question, which in this case is the present winding-up petition. That is the time factor. The event or case that gives rise to the need to apply is "where any action or proceeding against the company is pending", the "company" there being the company that is sought to be wound up, which in this case is the respondent company. That case or event must, of necessity, also be existing during the time factor, that is to say, during the pendency of the winding-up petition in question. Coupling the time factor with the case or event, we have a situation where, during the pendency of the winding-up petition in question, there is pending – that is to

say, by necessity of logic, also pending – an action or proceeding against the company that is sought to be wound up. The action or proceeding that is also pending must be other than the winding-up petition in question, although it may be some other winding-up petition. Now what may be applied for and ordered under s. 222 is a stay of further proceedings in the action or proceeding that is also pending, not further proceedings in the winding-up petition in question, which in this case is the present winding-up petition.

The result is as if the word "other" had been added to the phrase "action or proceeding" in s. 222, but that word has not been included because, I think, the intention of s. 222 is so clear from the way it is constructed that it would have been unprofessional to attempt to enhance the clarity by adding the word.

The English s. 226 was referred to in submission. It is as follows:

> 226. At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may –
>
> (a) where any action or proceeding against the company is pending in the High Court or Court of Appeal in England or Northern Ireland, apply to the court in which the action or proceeding is pending for a stay of proceedings therein; and
>
> (b) where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding;
>
> and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

It is to be noted that the event or case of an action or proceeding being pending against the company is, unlike in our s. 222, provided in two paras (a) and (b) because the application is to be made in different courts, depending on whether the action or proceeding falls under para. (a) or (b). Just as in our s. 222, the action or proceeding under para. (a) is not qualified by the word "other". In para. (b), however, it is so qualified, but not out of necessity to distinguish it from the winding-up petition in question but from, the action or proceeding in para. (a).

There is a note to the English s. 226 at p. 250 of *Companies, Law and Practice* by Magnus and Estrin (fifth edition) that says: "When it is not established that a petition constitutes an abuse of the process of the court or that it threatens a legal right of the company, it should not be stayed (*Bryanston Finance Ltd v. De Vries (No. 2)* [1976] 1 Ch 63, [1976] 1 All ER 25)". Learned counsel for the respondent company cited that note as

implying that the petition in question itself may be stayed. I find, however, after glancing through the *Bryanston Finance* case on which that note is based, that the case had nothing to do with the English s. 226 and that the reference in the note to staying a petition should properly be a reference to restraining by injunction the presentation of a winding-up petition. That was one of the matters which the case was about.

In *Foursea Construction (M) Sdn. Bhd.* [1998] 3 CLJ 135; [1998] 4 AMR 3508, Rekhraj J, at pp. 3513 and 3514, held the view that where winding-up proceedings have been initiated against a company, an application by the company under, s. 176(1), which is about compromises and arrangements, must be made in the winding-up proceedings and a stay of the proceedings may be granted under s. 222. I respectfully disagree, not only for the reasons that I have given but also because a stay in connection with a proposed compromise or arrangement under s. 176 is to be granted by virtue of s. 176(10) and not s. 222. I note that, in *Solid Kitchen Sdn Bhd v. Regal Development Sdn. Bhd.* [1998] 3 CLJ Supp 409; [1998] 6 MLJ 417, Rekhraj J again held that the winding-up petition in question may be restrained under s. 222.

I conclude by saying that s. 222 does not empower the court to stay the present winding-up petition. I dismiss the respondent company's application with costs.